No. 13509

United States
Court of Appeals
for the Ninth Circuit.

ALBERT J. CYR and WARREN H. PILLSBURY, Deputy Labor Commissioners, United States Department of Labor,

Appellants,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY,

Appellees.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-7-52

No. 13509

United States
Court of Appeals
for the Ninth Circuit.

ALBERT J. CYR and WARREN H. PILLSBURY, Deputy Labor Commissioners, United States Department of Labor,

Appellants,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY,

Appellees.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-7-52

INDEX

[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
MAX F. DEUTZ,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

For Appellees:

DeWITT A. HIGGS,
MILLER, HIGGS, FLETCHER & MACK,
725 Bank of America Bldg.,
San Diego 1, Calif.

In the District Court of the United States, Southern District of California, Southern Division

No. 1270-Civ.

CRESCENT WHARF & WAREHOUSE COMPANY, a Corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,

Complainants,

vs.

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,

Defendants.

COMPLAINT FOR INJUNCTION

Complainants complain of the defendants as follows:

I.

That at all times herein mentioned the complainants, Crescent Wharf & Warehouse Company and Pacific Employers Insurance Company, were corporations, duly organized and existing by virtue of the laws of the State of California.

II.

That at all times herein mentioned Warren H. Pillsbury and Albert J. Cyr were Deputy Commissioners of the United States Department of Labor,

Bureau of Employees' Compensation, 13th Compensation District, and administrators of the Longshoremen's [2*] and Harbor Workers' Compensation Act, Title 33, U.S.C.A. Section 901 to 950, inclusive.

III.

That the defendant, William Lasche, is the person in whose favor an order and an award of compensation hereinafter described was made on the 17th day of May, 1951; that said William Lasche is now, and was at all times herein mentioned, a resident of the County of San Diego, State of California.

IV.

That said William Lasche alleged in the claim filed by him with the said Bureau of Employees' Compensation against the complainants herein that said William Lasche was, on the 5th day of September, 1950, employed by said Crescent Wharf & Warehouse Company and that he sustained an injury on the said day arising out of and occurring in the course of his alleged employment, which allegations Crescent Wharf & Warehouse Company denied.

V.

That at all times herein mentioned the complainant, Pacific Employers Insurance Company, had in effect a policy insuring said Crescent Wharf & Warehouse Company against its liability under the said Longshoremen's and Harbor Workers' Compensation Act.

***Page numbering appearing at foot of page of original Certified**

VI.

That the said William Lasche filed a claim against these complainants with said Bureau of Employees' Compensation for the benefits provided in said Longshoremen's and Harbor Workers' Compensation Act and thereafter a hearing was held on the 4th day of April, 1951.

VII.

That on the 17th day of May, 1951, defendant Albert J. Cyr, acting in his capacity as Deputy Commissioner for said United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, made a compensation order and award of [3] compensation. That a true copy of said order and award of compensation is attached hereto and made a part hereof and referred to as "Exhibit A."

VIII.

That defendant Warren H. Pillsbury is a Deputy Commissioner in the United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District; that complainants are informed and believe and therefore allege that the said Warren H. Pillsbury is the Deputy Commissioner in charge of the area including the State of California and that said compensation order and award of compensation was made at his direction or under his supervision and issued out of his office and for that reason said Warren H. Pillsbury has been made a defendant in this proceeding.

IX.

That complainants have no adequate nor other remedy except by this proceeding which is brought pursuant to Section 921 of the said Longshoremen's and Harbor Workers' Compensation Act, which provides that if not in accordance with law, a compensation order may be suspended or set aside in whole or in part through injunction proceedings brought by any party interested against the Deputy Commissioner making the order and instituted in the Federal Court for the judicial district in which said injury occurred. Said injury occurred in the County of San Diego, State of California, and is in the judicial district of this Court.

X.

That at said hearing held April 4, 1951, defendant William Lasche testified that on September 5, 1950, while performing services for complainant Crescent Wharf & Warehouse Company, a Corporation, and while getting down from a hatch of about three feet in height, he felt a jar in his left heel. That said alleged injury occurred at about 7:30 to 8:00 p.m. of said [4] September 5, 1950. That he continued to work the balance of his shift but was noticed limping by one of his fellow employees. That the day after the alleged injury there was no work available but that he worked in his regular employment the second day following said alleged injury and continued to work for a period of eight to nine days thereafter. That nine or ten days after the alleged injury he sought the services of F. Bruce

Kimball, M.D., a physician of his own choice. Massage treatment was given and X-ray photographs taken of the left hip, knee and leg of said defendant William Lasche. That said X-rays disclosed no fracture, the condition of his left leg did not improve and that he voluntarily ceased being treated by Dr. Kimball and sought the services of Wilfred M. Knudtson, D.O. That Dr. Knudtson caused further X-ray photographs to be taken of his left leg and reported no fractures but did state his left leg was somewhat longer than his right. That he was wholly unable to work from September 5, 1950, to and including November 6, 1950. That on November 6, 1950, while going up a step ladder at his home he twisted his body, his left leg gave away and shortly thereafter, upon being medically examined, he was found to be suffering from a fracture of the neck of the left femur. Said defendant William Lasche further testified that he had been wholly unable to work from said November 6, 1950, to and including the date of the hearing.

Medical reports filed at said hearing state that no fractures of any kind were found prior to November 6, 1950.

XI.

That the act of the Deputy Commissioner Albert J. Cyr in making said alleged compensation order and award of compensation of May 17, 1951, is not in accordance with the law wherein it is found as a finding of fact, "That because of the instability of the left leg, this second injury is directly attribu-

table to [5] the injury of September 6, 1950." That pursuant to said finding of fact the said Deputy Commissioner made an award in favor of said defendant William Lasche as follows:

"Forthwith $805.00 representing compensation benefits accruing to April 4, 1951, and thereafter at $35.00 a week during the continuation of the total temporary disability or until the further order of the Deputy Commissioner.

"The employer and insurance company shall furnish to the claimant necessary medical care to cure or decrease the present disability resulting from said injury."

XII.

That the act of the Deputy Commissioner Albert J. Cyr, acting in his capacity as Deputy Commissioner, is not in accordance with law, in that:

(a) He acted without and in excess of his powers;

(b) He acted without and in excess of his powers of jurisdiction;

(c) The evidence does not justify nor support his findings of fact;

(d) The order of compensation and award violates the Fifth Amendment to the Constitution of the United States.

XIII.

That said compensation order and award is not in accordance with the law for the reason that it is based upon an erroneous conclusion of fact or an

absence of facts to justify the conclusion, to wit: That the second injury was an injury arising out of and in the course of the employment of said defendant William Lasche; that there was no competent medical or other evidence produced at the hearing before said Deputy Commissioner to establish that said second injury in any way arose out of or occurred in the course of defendant William [6] Lasche's said employment. That there is no evidence in the record to support the award of said Deputy Commissioner. That the evidence produced at said hearing establishes that said second injury resulted from activities at the home of the said defendant William Lasche.

XIV.

That the claim for compensation and the duly transcribed notes of the testimony taken at the hearing and the award of the Deputy Commissioner are all in the custody of the said defendant Deputy Commissioner Albert J. Cyr and it is necessary for this Court to have possession of the papers and the records of said hearing and all other relevant papers in the possession of said Deputy Commissioner in order to determine whether or not the award of said Deputy Commissioner was in accordance with law.

Wherefore, complainants pray that process in due form of law according to the course of this Honorable Court may issue and that defendants may be cited to appear and answer all the matters herein

set forth and that said compensation order and award dated May 17, 1951, be set aside and declared a nullity; that a mandatory injunction issue herewith setting aside said order of May 17, 1951, and that said Albert J. Cyr and Warren H. Pillsbury, as Deputy Commissioners or their successors in office, be permanently enjoined from making or attempting to make any further orders in respect to said proceedings; and complainants pray further for such other or different relief as to this Court may seem just and proper, and for their costs incurred herein.

Dated June 14th, 1951.

MILLER, HIGGS &
FLETCHER,

By /s/ DeWITT A. HIGGS,

Attorneys for Complainants Crescent Wharf & Warehouse Company, a Corporation, and Pacific Employers Insurance Company.

Duly verified. [7]

(Copy)

U. S. Department of Labor Bureau of Employees' Compensation, Thirteenth Compensation District

Case No. 76-2740

In the Matter of:

The Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act.

WILLIAM LASCHE,

Claimant.

Against

CRESCENT WHARF & WAREHOUSE COMPANY,

Employer,

PACIFIC EMPLOYERS INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER
AWARD OF COMPENSATION

Claim No. 3544

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 6th day of September, 1950, the claimant above named was in the employ of the employer above named at San Diego Harbor in the State of California in the 13th Compensation District established under the provisions of the Longshoremen's & Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Pacific Employers Insurance Company; that on said date claimant herein while performing services for the employer as a longshoreman foreman sustained personal injury resulting in his disability when while easing himself down from the top of a hatch he landed on his left foot and suffered a straining injury in the region of the left hip; that written notice of injury was not given to the employer within 30 days following said injury but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant in part with medical treatment in accordance with Section 7(a) [10] of the said Act; that shortly after the said injury the claimant went to a physician of his own choosing and that the employer is not liable for such self procured medical treatment; that on the date of the hearing, April 4, 1951, the employer was officially put on notice that further medical treatment was indicated and is liable for reasonable medical expense incurred since that date; that the employee's average weekly wages at the time of his injury was in excess of $52.50; that as a result of the injury

sustained claimant was wholly disabled for 12 intermittent days from the date thereof to and including November 6, 1950; that on the morning of November 7, 1950, while the claimant herein was at home and standing on the 2nd or 3rd step of a step ladder in his garage he lost control of his injured left leg, falling to the concrete floor of the garage, and shortly thereafter upon being medically examined was found to be suffering from a fracture of the neck of the left femur; that because of the instability of the left leg this second injury is directly attributable to the injury of September 6, 1950; that claimant has been wholly disabled beginning with November 7, 1950, to the date of the hearing, April 4, 1951, and that such disability is continuing; that compensation benefits accruing from date of the original injury to and including April 4, 1951, is twenty-three weeks at $35.00 a week, in the amount of $805.00, no part of which has been paid.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, Crescent Wharf & Warehouse Company, and the insurance carrier, Pacific Employers Insurance Company, shall pay to the claimant compensation as follows: Forthwith $805.00 representing compensation benefits accruing to and including April 4, 1951, and thereafter at $35.00 a week during the continuation of the temporary total disability or until the further order of the Deputy Commissioner. [11]

The employer and insurance carrier shall furnish to the claimant necessary medical care to cure or decrease the present disability resulting from said injury.

Given under my hand at San Francisco, Calif., this 17th day of May, 1951.

ALBERT J. CYR,
Deputy Commissioner, 13th
Compensation District.

[Endorsed]: Filed June 15, 1951. [12]

[Title of District Court and Cause.]

ANSWER OF ALBERT J. CYR AND WARREN H. PILLSBURY

Now Come the respondents, Albert J. Cyr and Warren H. Pillsbury, Deputy Commissioners, United States Department of Labor, Bureau of Employees Compensation District, 13th Compensation District, and for their answer to the Libel for Injunction herein, admit, deny and allege:

I.

Admit the allegations contained in paragraph I, II, III, V, VI, VII, VIII, IX, and XIV of said Libel.

II.

Admit the allegations contained in paragraph IV of said Libel with the exception that the injury

complained of occurred on September 6th rather than September 5, 1950, as alleged in said paragraph.

III.

Deny generally and specifically all the allegations contained in [13] paragraph X of said Libel for Injunction and allege that all the facts and circumstances pertaining to the injury of William Lasche complained of herein are set forth in the original proceedings of Commissioner Albert J. Cyr, a certified copy of which will be presented to the Court upon the hearing thereof, and that said original proceedings are available to the complainants for inspection.

IV.

Defendants deny paragraphs XI, XII, and XIII of said Libel.

Further Answering the Libel, the defendants, Deputy Commissioners Cyr and Pillsbury, aver that it is shown by the certified copy of the record before Deputy Commissioner Cyr that the findings of fact and the compensation award complained of are supported by substantial evidence, and under the law such findings are final and conclusive and not subject to review; that at the trial the certified copy of the record before Deputy Commissioner Cyr will be offered in evidence by the defendants to be reviewed by the Court.

Wherefore, defendants pray that judgment be

entered herein affirming said award in all respects and that the libel be dismissed.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant United States Attorney Chief, Civil Division.

/s/ CLYDE C. DOWNING,
Assistant United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 24, 1951. [14]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Jacob Weinberger, May 8, 1952.

The complainants herein, Crescent Wharf and Warehouse Company and Pacific Employers Insurance Company seek a mandatory injunction setting aside a compensation order made by a Deputy Commissioner of the United States Department of Labor on May 17, 1951.

It appears that compensation was awarded for disability after an injury which occurred to William Lasche on September 6, 1950, and further compensation was awarded for disability after a second injury which occurred to the same employee

on November 7, 1950. The complainants contend that there is no evidence in the record to support an award of compensation for disability occurring after the injury of November 7, 1950.

The Commissioner found that on September 6, 1950, while William Lasche was performing services for his employer, he sustained personal injury resulting in his disability when, while easing himself down from the top of a hatch, he landed on his left foot and suffered a straining injury in the region of his left hip. The Commissioner further found that as a result of said injury Lasche was wholly disabled for 12 intermittent days from September 6, 1950, to and including November 6, 1950. Such findings are amply supported by the record.

The record before the Commissioner disclosed that after the injury of September 6, 1950, Lasche came to the office of his physician, Dr. Knudtson, complaining of severe pain in the left hip, thigh and knee; that the pain did not respond to treatment until two or three weeks had elapsed; that after two or three weeks (quoting from the physician's letter) "it began to respond slowly but was very difficult for Mr. Lasche to walk even with the support of a cane. He [17] tried to work but was unable to continue doing so."

The record further discloses that Mr. Lasche testified that after eight or nine days from the date of the original injury he was hardly able to work at all; that he could not take work because of the condition of his leg and only worked inter-

mittently after the injury of September 6, 1950.

The record further shows that he refused work on various days because of his injury, and that on November 6, 1950, the day before the second injury, he refused work.

With reference to the injury of November 7, 1950, the Commissioner found

> "that on the morning of November 7, 1950, while the claimant herein was at home and standing on the 2nd or 3rd step of a step ladder in his garage he lost control of his injured left leg, falling to the concrete floor of the garage, and shortly thereafter upon being medically examined was found to be suffering from a fracture of the neck of the left femur; that because of the instability of the left leg this second injury is directly attributable to the injury of September 6, 1950 * * *"

The scope of this Court on a review of this sort is limited; as stated by the Supreme Court of the United States in O'Leary v. Brown-Pacific-Maxon, 340 US 504, 508, the Commissioner's findings "are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." The question which confronts us is whether there is evidence to support the Commissioner's finding that the [18] second injury was directly attributable to the first.

Defendants' counsel maintain that a casual relationship existed between the first injury, sustained

in the course of employment, and the second injury which Lasche sustained at home. Citing Schneider's Workmen's Compensation Text, (3rd edition) Vol. 6, p. 53, they quote:

> "* * * It makes no difference how long the chain, nor how many links, as long as each act or link accounts for the next, the liability existing in the first injury is carried forward to the last."

Among other cases defendants' counsel has cited the case of Continental Casualty Co. v. Industrial Commission, 284 p. 313, 75 Utah 220 (1929); in that case claimant was a taxi-driver who wrenched his left leg when he fell while in the course of his employment; later he went back to his regular work, but as he was on his way thereto, walking to the car-line, he slipped and fell and broke his leg. The Commissioner found that the second accident was entirely due to his former injury three days before, "by reason of the fact that the applicant was unable to bear his full weight on the said injured limb, this being the result of the weakened condition caused by the first accident."

The Supreme Court of Utah in its opinion at page 314 cited with approval Corpus Juris on Workmen's Compensation Act, page 70, as follows:

> " 'In determining whether the physical harm sustained by the employee was the consequence of the accident or the injury, the controlling question is the continuity of the chain of causation and the absence of an intervening inde-

pendent agency; the inquiry [19] as to whether the result is the natural and probable one is immaterial.' ''

Counsel for defendants have also cited a case decided under the Texas Workmen's Compensation Law (Vernon's Ann Civ. St. art 8306 et seq.), Zurich General Accident & Liability Ins. Co. v. Daffern, 5 Cir. 81 F. 2d 179, (1936). In that case the employee lifted a heavy steel shaft on April 4, 1934, and on April 9, 1934, lifted a heavy keg of nails; on both of such dates he was performing services within the scope of his employment. Following the lifting on April 9, 1934, he contracted hernia and was operated upon for such condition. As a result of the operation, claimant suffered a long confinement, and then was found to be afflicted with a spastic colon. The Court in its opinion observed (page 181) that the confinement was the "inevitable" incident of the operation for hernia, and was a "necessary" incident thereto, and such confinement aggravated preexisting ailments to produce the spastic colon which disabled the claimant, for which compensation was awarded.

At page 181 the Court continued:

"* * * When an employee suffers a specific injury in the course of his employment, he is not confined to the compensation allowed for that specific injury if that injury, or proper or necessary treatment therefor, causes other injuries which render the employee incapable of work."

A California Supreme Court case decided in 1918, Head Drilling Co. v. Industrial Accident Commission, et al., 170 p. 157 gives another instance of a second injury occurring away from the employment, but attributed to a first injury suffered in the scope of the employment. The [20] claimant sustained a fracture of the left leg and a badly comminuted fibula. He was taken to a hospital; there was difficulty in setting the bones in place and holding them for a permanent union. He was discharged from the hospital, the doctor deeming it best that he should begin to use the leg, but still supervising the case. He went to his home, the cast still on his leg, using crutches. Three days later he was sitting at his dining room table and arose to get some pictures from a shelf in back of him. There was a wrinkle in the rug which straightened out under his good foot and he caught at the table with his hand; his bad heel struck the pedestal of the table or a chair. An X-ray disclosed the bones were out of place.

The Commission found that the bones were often in danger of separation from natural causes in cases of that type; that such a separation might be anticipated; "that the evidence was insufficient to show that the separation was due to any substantial independent intervening cause or to any independent intervening cause; that said separation was instead a proximate and natural result of the original injury."

The Supreme Court, at page 158 observed:

"* * * We are of the opinion that a subse-

quent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause is a question of fact for the commission, to [21] be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld. The testimony of Scott, as to exactly what occurred on the evening of April 15th must be accepted here as true. According to this, there was nothing but the accidental striking by Scott of the heel of the foot of the injured limb against the pedestal of the table or a chair, done in the attempt to save himself from a fall, something to have been reasonably anticipated when he was discharged from the hospital in the condition in which he then was, and all of which happened without any negligence on his part. Surely, if such a thing might cause a displacement of the bones, he was in no condition to be called on to go about without an attendant, and it was reasonably to be anticipated that if he was left thus to care for himself, such a thing would occur. We have already noted the serious nature of the fracture, the length of time required to effect a

permanent reunion of the bones, and the extreme difficulty of keeping the bones in place and preventing displacement. Under all [22] the circumstances it appears to us that it might well be concluded as was concluded by the commission, that such an incident as was described by Scott, was not an independent, intervening cause, within the meaning of the law, but that the striking of the heel and consequent separation of the bones, which had been partially, but not permanently, united, was simply a proximate and natural result of the original injury."

Another California case, decided by the Supreme Court in 1915, Pacific Coast Casualty v. Pillsbury, 153 p. 24 shows the second injury in a different light than in the cases we have heretofore discussed. The employee was cranking a car while working in a garage and the radius of his right arm was broken and his wrist dislocated; the injury received proper treatment and progressed toward recovery as usual in such cases. Then a month and a half after the accident while claimant was on an automobile trip not connected with his employment the bone which had been broken slipped or shifted in such a manner that it was necessary to re-set it, thus prolonging his disability. The employer and the insurance company admitted liability for the average period that would have been required if no new injury had occurred to the bone, but refused to pay for medical treat-

ment and the prolongation of disability caused by the slipping of the bone. The Commission allowed compensation for the full time and for all medical services.

The Supreme Court observed at page 26 that the Commission had no power to award compensation for the [23] disability incident to the slipping of the bone unless such slipping was the "natural or proximate result of the original injury." The Court then referred to the law in force prior to the Workmen's Compensation Act, to the well established principle that a person injured by the negligence of another must use ordinary care to avoid aggravating or prolonging the effects of such injury and that such person could not recover for an increase of disability caused by his failure to use such care. The Court then held that an additional injury to the claimant caused by carelessly using his arm too much was not within the provisions of the statute and that he could not be awarded compensation therefor. The case was sent back to the Commission to re-hear it and to allow only for the disability which they might find would exist if the bones had not slipped.

In Deep Rock Oil Corporation v. Betchan, 35 P. 2d 905, the Supreme Court of Oklahoma announced the following principle of Workmen's Compensation law, at page 908:

> "It seems that a law designed to compensate workmen for loss of earning capacity from industrial accidents must have been intended to extend its shield at least to aggravations affect-

ing the course of the injury during convalescence when such are produced by not unnatural events and involve no omission or breach of duty * * * ''

The Court based its enunciation of this principle as follows:

"In Tippett & Bond v. Moore, 167 Okl. 636, 31 P. 2d 583, our court held disability [24] referable alone to a first injury when a second one had intervened to precipitate further incapacity. The principle is a familiar one in tort law and was stated in Hoseth v. Preston Mill Co., 49 Wash. 682, 96 P. 423, 425, in this language: 'The rule is that the injured person must exercise reasonable care to effect a cure, both as to the selection of a physician and as to his own personal conduct, and if he does so he may recover all damages flowing naturally and proximately from the original injury * * *' ''

While counsel for the respective parties have cited cases decided under state compensation laws, and we have reviewed others not cited, we have found no case decided under the Longshoremen's and Harbor Worker's Compensation Act which specifies the conditions under which a second accident such as Lasche's may be attributed to a first accident suffered in the scope of employment.

The Act does include in its definition of "injury" such occupational disease or infection as naturally or unavoidably results from such accidental injury, the case of Ocean S. S. Co. of Savannah, et al. v.

Lawson, 5th Cir. 68 F. 2d 55, contains language which we feel is appropriate. In that case, the employee died, not as a direct result of an injury to his foot suffered in the course of his employment, but because of a tetanus infection. The wound had been properly treated, was clean and apparently healing when the employee left the hospital. Later, he left his foot unbandaged and wore a colored sock. The Court stated, p. 56:

> " * * * The main disputable fact before [25] the commissioner was whether the infection which killed him resulted naturally or unavoidably from his injury or was caused by his own mistreatment and exposure of his wound * * * . By a fair construction of the statute a death caused by infection following an injury is caused by the injury if the infection followed naturally or unavoidably; but if the infection is not natural but extraordinary, and if it could by reasonable care have been avoided, death is not to be considered as due to the injury."

We cited this case to counsel and asked for additional briefs; counsel for defendants maintained that the doctrine of contributory negligence has no place in cases under workmen's compensation acts.

We do not agree that this is so when a second injury occurs outside the scope of the employment. We think an injured employee owes to his employer, at least while in the pursuit of the employee's own concerns, the duty of reasonable care to avoid aggravation or prolongation of his disability.

The facts show that Lasche was using a cane after the first injury, that while he had worked all but twelve intermittent days between the two accidents, he had refused work the day before the second injury because of disability. A man in such a condition who steps upon a ladder, thus bearing his full weight upon an injured leg can hardly be said to have been using any care with reference to his injury. [26]

It is our view that subsequent injury was the result of an independent intervening cause, that the subsequent injury did not follow naturally or unavoidably; that it could have been avoided by reasonable care; and, that there is no evidence in the record to support any different conclusion.

An injunction should issue, and the matter should be referred to the Commissioner to fix, after a hearing if necessary, compensation for the period which the original disability might have continued if the second accident had not occurred.

[Endorsed] Filed May 9, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried by the court without a jury, the court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1

The Court adopts the following portion of the Commissioner's Findings:

That on the 6th day of September, 1950, the claimant above named was in the employ of the employer above named at San Diego Harbor in the State of California in the 13th Compensation District established under the provisions of the Longshoremen's [28] & Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Pacific Employers Insurance Company; that on said date claimant herein while performing services for the employer as a longshoreman foreman sustained personal injury resulting in his disability when while easing himself down from the top of a hatch he landed on his left foot and suffered a straining injury in the region of the left hip; that written notice of injury was not given to the employer within 30 days following said injury but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant in part with med-

ical treatment in accordance with Section 7 (a) of the said Act; that shortly after the said injury the claimant went to a physician of his own choosing and that the employer is not liable for such self-procured medical treatment."

2

The Court further finds:

That after the injury of September 6, 1950, claimant had difficulty in walking and used the support of a cane; that on November 6, 1950, the claimant refused work because of the condition of his leg.

3

The Court adopts the following portion of the Commissioner's Findings:

"That the employee's average weekly wages at the time of his injury was in excess of $52.50; that as a result of the injury sustained, claimant was wholly disabled for 12 intermittent days from the date thereof to and including November 6, 1950; that on the morning of November 7, 1950, while the claimant herein was at home and standing on the second or third step of a stepladder in his garage he lost control of his injured left leg, falling to the concrete floor of the garage, and shortly [29] thereafter upon being medically examined was found to be suffering from a fracture of the neck of the left femur."

4

The Court further finds:

That the subsequent injury of November 7, 1950,

was the result of an independent intervening cause and did not follow naturally or unavoidably, the first injury of September 6, 1950.

5

The Court further finds:

That the subsequent injury of September 7, 1950, could have been avoided by reasonable care on the part of claimant.

6

The Court further finds:

That there is no evidence in the record to support the Commissioner's finding that the second injury of November 7, 1950, was directly attributable to the injury of September 6, 1950.

From the foregoing Findings of Fact the court concludes:

1

The court has jurisdiction over the parties herein.

2

Jurisdiction of the subject matter of this controversy is vested in this court by Section 921 of Title 33 of the United States Code.

3

Complainants are entitled to an injunction restraining Defendants Albert J. Cyr and Warren H. Pillsbury, Deputy Commissioners, United States Department of Labor, from enforcing the Award dated May 17, 1951, in Case No. 76-2740, and said Case No. 76-2740 should be referred to the Deputy

Commissioners, United States Department of Labor, to fix after a hearing if necessary, compensation for the period during which the original disability [30] of September 6, 1950, might have continued if the second injury of November 7, 1950, had not occurred.

Dated this 4th day of June, 1952.

/s/ JACOB WEINBERGER,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 5, 1952. [31]

In the United States District Court in and for the Southern District of California, Southern Division

No. 1270-SD

CRESCENT WHARF & WAREHOUSE COMPANY, a Corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,

Complainants,

vs.

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,

Defendants.

ORDER

This cause having come on for hearing and the issues therein having been tried before the court without a jury, and the evidence of all the parties hereto having been heard, and the court having duly made Findings of Fact and Conclusions of Law;

Now, It Is This 4th day of June, 1952, Ordered, Adjudged and Decreed as Follows:

1. Defendants Albert J. Cyr and Warren H. Pillsbury, Deputy Labor Commissioners, United States Department of Labor, herein, their agents, servants, attorneys and privies and each of them, are hereby permanently enjoined and restrained from enforcing the Award dated May 17, 1951, in Case No. 76-2740, Claim No. 3544 [32] of United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District.

2. It Is Further Ordered, Adjudged and Decreed that the said Case No. 76-2740, Claim No. 3544, is hereby referred back to the Deputy Commissioner of the 13th Compensation District in order that he can fix, after a hearing if necessary, compensation for the period which the original disability of September 6, 1950, might have continued if the second injury had not occurred.

Dated this 4th day of June, 1952.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed June 5, 1952.
Docketed and entered June 6, 1952. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the defendants, Albert J. Cyr and Warren H. Pillsbury, Deputy Labor Commissioners, United States Department of Labor, hereby appeal to the United States Court of Appeals, for the Ninth Circuit, from the Order Granting a Permanent Injunction, entered in this action on June 6, 1952.

Dated at Los Angeles, California, this 23rd day of July, 1952.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Defendants.

[Endorsed]: Filed July 23, 1952. [34]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages

numbered from 1 to 37, inclusive, contain the original Complaint; Answer; Memorandum of Conclusions; Findings of Fact and Conclusions of Law; Judgment (Order dated June 4, 1952); Notice of Appeal and Designation of Record on Appeal which, together with original Defendants Exhibit A, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 26th day of August, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13509, United States Court of Appeals for the Ninth Circuit. Albert J. Cyr and Warren H. Pillsbury, Deputy Labor Commissioners, United States Department of Labor, Appellants, vs. Crescent Wharf & Warehouse Company and Pacific Employers Insurance Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed August 27, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13509

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,

Appellant,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a Corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,

Appellee.

STIPULATION FOR CONSIDERATION OF ORIGINAL EXHIBIT WITHOUT THE NECESSITY OF THE PRINTING THEREOF

It is hereby stipulated by and between the parties to this appeal through their respective counsel that due to the length of Exhibit A in this proceeding and the attachments thereto, constituting the original transcript of proceedings before the Deputy Commissioner and exhibits in connection therewith, that, subject to the approval of this Court, said Exhibit A may be considered by this Honorable Court on Appeal in its original form without the necessity of

having the same incorporated into the printed record on appeal.

MILLER, HIGGS, FLETCHER AND MACK.

By /s/ WILLIAM E. SOMMER,

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Appellant.

ORDER

This Stipulation having been presented to the Court, and it appearing that there is good and sufficient reason for this Court considering Exhibit A, as described in said Stipulation, in its original form in lieu of the same being incorporated as part of the printed record on appeal, It Is So Ordered.

Dated: September 12, 1952.

/s/ WILLIAM DENMAN,

/s/ HOMER BONE,

/s/ WM. E. ORR,
Judges, U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed September 12, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN PRINTED RECORD ON APPEAL

Appellant requests that the record as certified to the Court of United States Court of Appeals for the Ninth Circuit be printed in its entirety except for original Exhibit A and the attachments thereto which have been certified as part of the record on appeal.

Dated:

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed September 12, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant intends to rely upon the following points on appeal of the above-entitled cause:

I.

That the Court erred in holding in substance that the injured employee could not recover for his consequential injury because of his negligence in getting upon a stepladder in his then condition for the following reasons:

A.

Negligence of the employee (fault) is not an element in compensation law either with respect to recovery for the original injury or any subsequent result of said injury, including the effects of a consequential injury.

B.

Even if negligence were material as to consequential injuries, the Deputy Commissioner as the trier of the fact would have the right and the duty of determining whether the injured employee was careless and whether such carelessness caused the second injury. In determining such fact for itself, the Court usurped the power of the Deputy Commissioner, contrary to the great weight of authority.

Dated:

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney.

[Endorsed]: Filed September 12, 1952.